Supreme Court, U.S.
FILED
MAY 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIM BACA, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, *et al.*,
Petitioners,

v.

DAVID ROE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under New Mexico law, the reservation of an interest in "minerals" in a conveyance of real property operates to reserve an interest in sand and gravel.*

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* The corporate respondents, United Continental New Mexico, Inc., and Buena Vida, Inc., have no parent companies or subsidiaries and are affiliated through common ownership only with each other.

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STATEMENT

This case involves a dispute over the meaning of the terms of an agreement pursuant to which the State of New Mexico sold certain real property in 1964. "The purchase contract . . . stated that 'the minerals therein shall be and are reserved,' and the patent reserved 'to the State of New Mexico all minerals of whatsoever kind.' " Pet. App. 3a. Neither document defined the term "minerals," however.

In 1981, a disagreement arose between the State and David and Sheila Roe (the present landowners and the

successors in interest to the original purchaser from the State) concerning the right to remove gravel. The State Commissioner of Public Lands, claiming that the State's reserved interest in "minerals" embraced sand and gravel, issued a sand and gravel lease to the State Highway Department. In turn, the Highway Department authorized a private contractor, Kent Nowlin Construction Company, to enter upon the land and remove gravel. "[A] total of approximately 174,000 cubic yards of processed gravel was expected to be removed." Pet. App. 3a. The Roes thereupon brought this suit for inverse condemnation, seeking damages for removal of the gravel.

The Fifth Judicial District Court, Chaves County, held that the State owned the gravel. The district judge did not write an opinion but at the summary judgment hearing indicated that he believed the land in question to be subject to the restrictions imposed by the Jones Act of 1927, 43 U.S.C. Section 870. *See* Pet. App. 12a. That statute provides that if a state sells numbered section common school lands without reserving an interest in "coal and other minerals," the lands "shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General . . . ." 43 U.S.C. Section 870(b). The district court evidently concluded that it was necessary to interpret the term "minerals" in the conveyancing instruments as covering sand and gravel in order to avoid the risk of forfeiture under the Jones Act.

The Supreme Court of New Mexico reversed. The court began by noting that the land at issue here is not in fact subject to the restrictions imposed by the Jones Act. "By its express terms, [43 U.S.C.] Section 870 applies only to the specific sections of land granted to the states for support of public schools, and does not apply to land which has been 'granted to and/or selected by and certified or approved as indemnity or in lieu of'

school land." Pet. App. 5a. In addition, 43 U.S.C. Section 871 expressly states that section 870 "shall not apply to indemnity or lieu selections." *Id.* Because the land at issue here "was selected by the State *in lieu of*, or as indemnity for, common school land," Pet. App. 7a (emphasis in original), the land "is therefore not subject to the provisions of Section 870." *Id.* Having thus determined on factual grounds that the property was not subject to the restrictions imposed by the Jones Act, the court proceeded to apply the usual rule of construction under state law: "the cases in New Mexico are in agreement that sand and gravel are not included within the scope of a general mineral reservation contained in a contract of sale or patent." Pet. App. 8a.

ARGUMENT

1. *The state court judgment below was based upon an adequate and independent state ground.* The petitioners suggest that this case presents the question whether the phrase "coal and other minerals" in the Jones Act should be construed *in pari materia* with the same phrase in the Stock-Raising Homestead Act of 1916, 43 U.S.C. Section 299. Pet. 9-10. Because the latter statute was construed to cover gravel in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), the petitioners contend that the Jones Act must be similarly construed. Pet. 10-12, 14-19. But this case does not involve a question under the Jones Act or any other federal statute. It presents no issue of federal law.

The petitioners rightly concede that, as a factual matter, the Roes' land is "not . . . governed by the Jones Act." Pet. 19. *See also id.* at 7. Consequently, the court below had no occasion to decide, and did not decide, the meaning of the phrase "coal and other minerals" in the Jones Act. The question which the court actually decided involved only the meaning of the word "minerals" as a matter of state conveyancing law—a

question that, as the court below correctly observed, is "not one of federal law, but solely of state law." Pet. App. 8a.

This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The decision below does not adjudicate any disputed federal rights. Nor does it call into question the validity of any state or federal statute. It merely adjudicates the parties' rights under local conveyancing law. Accordingly, the case lies outside this Court's jurisdiction under 28 U.S.C. Section 1257(3).

Moreover, even putting aside the problem of jurisdiction, the issue of state conveyancing law decided below obviously does not warrant review by this Court. It is purely a matter of local concern, and the state court simply followed its own well-established precedents. *See Jensen v. State Highway Commission*, 97 N.M. 630, 642 P.2d 1089, *cert. denied*, 459 U.S. 838 (1982); *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978).

2. *The petitioners' concerns about forfeiture under the Jones Act are speculative and premature.* The petitioners are worried that the court below may apply the same rule of state conveyancing law in future cases involving land subject to the Jones Act, with the result that such land may become liable to forfeiture to the United States. Pet. 12-14, 19-21. These worries are speculative and premature. All indications suggest that, when the state court does address issues involving land subject to the Jones Act, it will protect the State against forfeiture. Indeed, the court in this case predicated its application of the usual state rule of construction upon the absence of "any federal prohibition of, or limitation on the State's right to sell or otherwise convey such lieu lands . . . ." Pet. App. 8a.

The state court already has shown its willingness to follow applicable federal law. In a decision announced five weeks prior to the decision in the instant case, the court acknowledged that, in light of this Court's decision in *Western Nuclear*, the usual state rule of construction is not applicable in cases involving land governed by the Stock-Raising Homestead Act. *Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985), *overruling State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971). *See* Pet. App. 8a-9a. The court can be expected to recognize a similar exception to the state rule for land subject to the Jones Act.

Finally, even if in some future case involving property subject to the restrictions of the Jones Act the state court were to hold that the State's reservation of an interest in "minerals" did not embrace sand and gravel, that holding standing alone would not involve a federal issue. It would simply adjudicate the respective rights of the State and the landowner under state law. The separate and distinct federal question that the petitioners mistakenly try to raise here—whether failure to reserve an interest in gravel constitutes a basis for forfeiture under the Jones Act—would not be squarely presented unless and until the United States, in a still later case, sought such forfeiture.[1]

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[1] The situation was different in *Western Nuclear*. The land patent in question there had been issued not by a State but by the United States, subject to a congressional reservation to the United States of an interest in "coal and other minerals." Consequently, in that case the scope of the land patent and the meaning of the federal statute necessarily were one and the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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